No. 78-290

In the Supreme Court of the United States

OCTOBER TERM, 1978

ELIAZAR HERRERA-VINEGAS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

SIDNEY M. GLAZER
JODY M. LITCHFORD
Attorneys
Department of Justice
Washington, D.C. 20530

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 11a-12a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 16, 1978 (Pet. App. 11a). A petition for rehearing was denied on June 21, 1978 (Pet. App. 14a). On July 19, 1978, Mr. Justice Powell extended the time for filing a petition for writ of certiorari to and including August 10, 1978, and on August 14, 1978, he further extended the time for filing to and including August 20, 1978, a Sunday. The petition was filed on August 21, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court should have appointed a Spanish-English interpreter.

2. Whether the trial court abused its discretion in denying petitioners' motion to transfer the trial to Chicago.

3. Whether a motion for a continuance should have been granted.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioners were convicted of conspiracy to import 23 pounds of heroin into the United States from Mexico, in violation of 21 U.S.C. 963; conspiracy to possess heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846; and aiding and abetting the substantive offenses of importation and possession with intent to distribute (Pet. App. 12a). They were each sentenced to a total term of imprisonment of 45 years, with a 45-year special parole term. In addition, Herrera-Vinegas was fined $100,000 (*ibid.*).

The evidence showed that Alfredo Alamo-Ramirez, an unindicted co-conspirator, was apprehended on June 8, 1977, as he attempted to bring 23 pounds of heroin into Texas from Mexico (Tr. 113-122, 154). The narcotic was hidden in a compartment of the gas tank of his car (Tr. 113-118, 262). Alamo-Ramirez told Drug Enforcement Administration agents that he was to telephone a man known as "Charro" when he reached Chicago and deliver the heroin to him (Tr. 153-154, 259).

Alamo-Ramirez agreed to go with the agents to Chicago and to call Charro as he had originally planned (Tr. 136, 264). Petitioner Herrera-Vinegas, who identified himself as "Charro," answered the telephone (Tr. 181-182, 267) and arranged with Alamo-Ramirez for delivery of the heroin (Tr. 214-222). Petitioners Martinez-Fragoso and Galindo-Herrera actually appeared to accept delivery; they were arrested as they made the exchange (Tr. 239, 272-283). Herrera-Vinegas was arrested shortly thereafter at his home (Tr. 239).

ARGUMENT

1. Petitioners contend (Pet. 8-9, 11-12) that they were denied a fair trial because they were "forced to trial without an interpreter." This claim, which was not advanced in the court of appeals and therefore is not properly raised in this Court (see *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977)), is insubstantial.

Petitioners Martinez-Fragoso and Galindo-Herrera made no request for an interpreter at any time, nor did they indicate in any way that they had difficulty understanding or speaking English.[1] There is therefore no basis in the record for their claim that they were improperly denied an interpreter.

Petitioner Herrera-Vinegas did not ask for assistance before or during trial, but his counsel did state at sentencing "I'm not certain of this man's ability to understand, Your Honor, English. I have had difficulty communicating with him" (Tr. 477; Pet. App. 15a).[2] Herrera-Vinegas now claims that this belated assertion introduced reversible error into his entire trial.

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[1]The record shows that petitioner Galindo-Herrera is a lifelong resident of Chicago who went to school nine years and completed six grades in the United States (Tr. 478-479).

[2]A letter of defense counsel to petitioner Herrera-Vinegas, written after the case was argued on appeal, states "You do not speak English" (Pet. App. 22a-23a).

Contrary to petitioner's claim, he has no constitutional right to court appointment of an interpreter, since he is not indigent. *United States* v. *Desist*, 384 F. 2d 889, 901-903 (2d Cir. 1967); cf. *Gideon* v. *Wainwright*, 372 U.S. 335, 339-340 (1963). It was his responsibility in the first instance to obtain an interpreter, as the trial court noted (Tr. 477). He cannot fault the court for failing to inquire into his desire for a service that it was his responsibility to secure, and for which he did not indicate any need until the trial was completed and he had been convicted.

In any event, he was not prejudiced by not having an interpreter during trial. Herrera-Vinegas is a "long-time" resident of Chicago (Appellant's Brief on Appeal 17), and he was able to understand and answer the questions put to him at arraignment without apparent difficulty (Tr. 2-3). He points to no evidence that he in fact did not understand the proceedings. And when his counsel stated at sentencing that he thought an interpreter was necessary,[3] the court immediately instructed its interpreter to assist Herrera-Vinegas.

In these circumstances, there is no occasion for this Court to review Herrera-Vinegas' claim.

2. Petitioners contend (Pet. 6, 7-8, 10-11) that they were denied a fair trial because the court refused to transfer their case to Chicago. They claim that this refusal prevented them from obtaining witnesses who would testify in their defense.

[3]Counsel's remark at sentencing may well have reflected only counsel's concern about Herrera-Vinegas' ability to express himself fluently during allocution.

Transfer under Fed. R. Crim. P. 21(b)[4] is committed to the sound discretion of the trial judge. *Platt* v. *Minnesota Mining Co.*, 376 U.S. 240, 245 (1964). Here, the court responded to petitioners' claim that they could not bring defense witnesses to Texas for the trial by stating that it was willing to bring all necessary witnesses at government expense. But it asked first that defense counsel list the witnesses and their expected testimony (Tr. 10-12). The court explained that it needed this information so that the government would not be put to needless expense. Defense counsel refused to provide the requested information (Tr. 10). In these circumstances, and in view of the vagueness of the claims that useful witnesses could be found in Chicago (see Tr. 11), the court's refusal was entirely proper. See *United States* v. *Noland*, 495 F. 2d 529, 534 (5th Cir.), cert. denied, 419 U.S. 966 (1974).

3. Petitioners further contend (Pet. 6, 8, 11) that the trial court's refusal to grant them a continuance denied them a fair trial because counsel did not have adequate time to prepare and obtain witnesses.

A motion for continuance is addressed to the sound discretion of the trial court and its ruling should not be disturbed unless a clear abuse of discretion is shown. *Ungar* v. *Sarafite*, 376 U.S. 575, 588-591 (1964). Petitioners made their request for a continuance on August 15, 1977, the beginning date of the trial (Tr. 5-13). At that time, a month and a half had passed since petitioners' June 29, 1977, arraignment. Moreover, the

[4]Rule 21(b), Fed. R. Crim. P., provides:

> For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to him or any one or more of the counts thereof to another district.

facts of the case were not difficult, and full discovery had been ordered and complied with (III R. 82). Petitioners' allegations that additional witnesses could be interviewed were vague, and no evidence as to their actual availability or the usefulness of their testimony was provided to the court.

In these circumstances, petitioners' claims that they needed additional time to prepare were properly rejected by the trial court. See *United States* v. *Uptain*, 531 F. 2d 1281, 1286-1287 (5th Cir. 1976); *United States* v. *Miller*, 513 F. 2d 791, 793 (5th Cir. 1975).[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

SIDNEY M. GLAZER
JODY M. LITCHFORD
Attorneys

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[5]The instant case presented none of the complexity or potential for miscarriage of justice that would have justified the trial court in granting a continuance under the Speedy Trial Act. See 18 U.S.C. 3161(h)(8)(A) and (B).

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